IN THE

Supreme Court of the United States

October Term, 1964

No. 753

KIT MANUFACTURING COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

Respectfully submitted,

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December, 1964

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IN THE

Supreme Court of the United States

October Term, 1964

No._____

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Kit Manufacturing Company, Inc., your petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the National Labor Relations Board entered June 7, 1963 (Record, Folio 80-85), is reported at 142 NLRB 107. The opinion of the Court of Appeals

for the Ninth Circuit (Record, Folio 73-78) has not yet been reported.

JURISDICTION

The judgment of the Court below (Record, Folio 73-78) was entered on August 5, 1964. A timely petition for rehearing was denied on September 15, 1964, the day after its filing (Record, Folio 79). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED

I.

Is an employer required to continue bargaining after two years and numerous meetings and after having submitted two or three complete counter proposals?

II.

May an employee have the protection of a "concerted activity;" return to work; violate company rules; have without notice and return to the protection of a "concerted activity."

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix A, infra, pages; National Labor relations

Act as amended (61 Stat. 316, 73 Stat. 519, 29 U.S.C., Section 151 et seq.) Section 7, Section 8(a)(1), Section 8(a)(3), Section 8(a)(5) and Section 10(e).

STATEMENT

The sheet metal workers union Local No. 213, AFL-CIO was certified as the bargaining agent for the Respondent company on March 31, 1961, and from that time until September 27, negotiations were carried on through a series of meetings. During all of the meetings and on September 27, 1961, the real and only serious issue in dispute was union security. On September 27, 1961, the Company submitted a complete counter-proposal containing all of the conditions which had been negotiated but did not contain the union security clause demanded by the Union. As a result, an impasse was reached.

On or about December 5, 1961, the Union filed a charge against the Respondent alleging that the Respondent had refused to bargain. Upon investigation of this charge, the charge was dismissed and the Company was absolved by the Regional Director. January 9, 1962, Case No. 19-CA-2341.

Since the year of certification had expired, the Company filed an RM petition with the Regional Director asking for an election alleging serious doubts as to the right of the Union to represent its employees. The Regional Director refused to consider the petition or to conduct an election.

Negotiations were commenced again in June and

July, but again became deadlocked on the question of union security. During this period, for competitive reasons and because other increases had been made in the industry, and with the consent of the Union, the Company made an increase of ten cents per hour on its wages. While there was some question as to the restrictions made by the Union in its letter authorizing the Company to make the increases, the increases were announced to the employees through union meetings and otherwise. A strike was called on or about the first day of July, 1962.

From and since the date of the strike, the Union was urged to put the men back to work without avail. The union admits that it gave no notice of the strike, failed to call in Conciliation or Mediation and refused to bring the men back to work while the issues could be conciliated or negotiated.

A complete counter-proposal was again submitted to the Union on October 1, 1962, with a request that the same be taken to the employees for approval or disapproval. The Union admits that the counter-proposal was not submitted to the employees until October 25, and an answer to the counter-proposal was not received from the Union until the employer requested the same on October 25.

The strike with attending pickets lasted from July 1 to August 6 with about 70% of the employees striking and with about 15% of the strikers returning to work voluntarily. On August 6, 1962, 46 of the striking employees, constituting practically all of the strikers, ap-

plied for re-employment and the Company agreed to return them unconditionally by August 13 or 14 at which time all applicants were rehired except one, Charles Tveidt.

CHARLES TVEIDT

The Trial Examiner found that employee Tveidt had voluntarily left the protection of the strike agreed to come back to work on a permanent basis, and then deliberately violated the Company's rules by leaving his job without notice and since this was an individual and not a concerted action, Tveidt was not protected by the act. The Board modified and overruled this finding and held that the employee, after going on strike on July 2 and after going back to work on a voluntary basis, in effect retroactively abandoned his voluntary re-employment status and retroactively joined the strike. In other words, the Board held that at one time he could be individually and voluntarily acting in his own behalf, and could as an individual abandon the strike and return to work, that he could then with impunity change his mind and go out as an individual. This we contend was not a concerted activity and did not have the protection of the law as such.

Justice Merrill, in rendering the decision of the Court of Appeals, erroneously interpreted the uncontradicted statement of the Respondent company wherein the manager, Dewey Reber, stated that when the employee Tveidt left his employment without notice, his record was not marked "discharged" for two or

three days. Mr. Reber explained that this was done to give the employee an opportunity to explain his absence before he was actually discharged. The Court on the other hand held that this meant that he was not discharged for walking off the job, but was discharged for failure to return within several days. This is clearly an erroneous interpretation and shows a lack of knowledge of employment practices.

The Trial Examiner for the National Labor Relations Board held the employer guilty of a violation of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, but held that the employee's action in voluntarily quitting his job without notice, being individual action, was not protected as a concerted act.

Upon filing exceptions to the report, the National Labor Relations Board overruled the Trial Examiner and held that the actions of the employee were protected as a concerted activity under the act, the Ninth Circuit Court of Appeals approved the decision of the National Labor Relations Board with a modification of one of the charges under Section 8(a)(1). (Record, Folio 80-85)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Ninth Circuit Court of Appeals in this case is squarely in conflict with the decisions of the Sixth Circuit Court in the case of *NLRB v. Cambria Clay Products*, 215 F.2d 43, and is squarely in con-

flict with this Court's decision in the case of *NLRB v. American National Insurance Company*, 343 U. S. 403, and is squarely in conflict with the holding in the case of *NLRB v. American Aggregate Company et al*, 335 F. 2d 253 (C.A. 5), decided August 1964, interpreting Section 8(d), holding in effect that the law does not require the employer to make concessions thereunder.

> "In this situation, the unwillingness of management to surrender the assertion of its rights of management by agreeing to the union's wishes to curtail them, does not in any respect violate the law. This was definitely settled and laid to rest by this Court in American National Insurance Co. v. NLRB, (19 LC P66, 188), 187 F. 92 307 affirmed on full discussion in 343 U. S. 395."

> "The Supreme Court, in National Labor Relations Board v. American National Insurance Co. (21 LC P66, 980) 343 U. S. 395, note 2, supra, has precisely decided to the contrary, that neither board nor court has any power or function to order or compel management to agree to particular clauses or demands merely because the Labor Board or a court might think that the refusal to agree was unreasonable."

The record in this case shows that the union was certified as the bargaining representative in early 1961 and from that time forward the company had met with the union at all times upon request and that the main issue in controversy was union security, that charges had been filed against the employer for refusal to bargain and the charges were dismissed. (January 9, 1962, Case No. 19-CA-2341) The record shows that the peti-

tioner submitted at least three complete counter proposals (Tr. 78-79), which were refused. The record shows that a strike was called which was abandoned and that the employees with one exception were all reinstated. The record is clear and unequivocally shows that the employer more than met the requirements of section 8(a) by negotiating at all times, by discussing all questions and by submitting complete counter proposals in good faith, but refused to make concessions on the union security provision.

II.

DISCHARGE OF EMPLOYEE TVEIDT

The decision of the Court of the Ninth Circuit in this case is contrary to the decision of the NLRB with reference to the protection for concerted activities and is a new and novel question of extreme importance seeking to establish a new rule giving individuals the same protection heretofore given to concerted action by a group of employees. The undisputed testimony in the case shows that Charles Tveidt went out on strike on or about the 2nd of July, 1962, but abandoned the strike and voluntarily returned to work on the 23rd day of July, 1962, and at the time he reported back for work he promised to remain at work permanently. The employee left his work station at noon on July 23rd without notifying his foreman or without giving any other notice, and admitted that he had violated the company rules. The only evidence in the record as to the employee

joining the strikers was an admission by the manager that he had seen Tveidt near the picket line.

The question presented is new and novel and unusual inasmuch as the decision from the Ninth Circuit attempts to protect an individual's act rather than a concerted acivity. There are just two alternatives, either one of which would protect the employer in his right to discharge the employee in question.

If the employee was sent back to work by the union as a strategy of the strike with instructions to work a half a day and disrupt the employer's operations by quitting without notice, that act in itself would not be a protected activity and would constitute an unlawful weapon of strikers. If, on the other hand, as appears to be the case, the employee voluntarily decided to abandon the strike and to return to work, this in itself was an individual voluntary act, an act which the employee had a right to perform and if, while acting on his own as an individual, he violated the company rules and left his working position in the assembly plant without notice, disrupting the plant's operations, he is not entitled to any protection under the law nor can his actions be made legal retroactively. The act of leaving the premises without notice was an admitted violation of the company rules and this act in our opinion cannot be made legal or proper by any acts that the employee may have performed thereafter, such as joining the strikers, if he actually did join the strikers. Obviously, one man cannot leave his job and call a one man strike and ask for protection therefor. In the case of Servantes, dba Panaderia Sucesion Alonso, 1949, 87 NLRB 877, the

National Labor Relations Board held that since Section 7 grants rights exclusively to "Employees" any concerted activity must be more than one "employee" in order to obtain the protection of Section 7. We do not believe one employee and non-employees together may engage in protected concerted activity within the meaning of the Act and in NLRB v. Texas National Gasoline Corporation (CA5, 1958), 253 F.2d 322, the Fifth Circuit held that a strike to protest discharge in whch one discharged worker and one employee participated was not protected concerted activity for the discharge was lawful. This rule is also followed in NLRB v. Office Towel Supply Co., (Second Circuit) 201 F.2d 838, and the administrative decision of the National Labor Relations Board General Counsel in case K86. The Board adopted this doctrine in the Underwood Machinery case, 74 NLRB 641 (1947). The rule has been well established that an employee may not leave his job as an individual and obtain the protection as a concerted activity.

Not one of the cases submitted by the General Counsel or referred to by the Court touch upon the question of an employee acting on his own. All of the cases referred to and relied upon concern "concerted activities," which we have admitted are protected.

CONCLUSION

To protect the law as announced by this Court in its decisions heretofore referred to and to resolve the new and novel question of an individual's rights to claim

protection as a concerted activity and to determine effectiveness of a large number of cases by the National Labor Relations Board, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1964

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3,.

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organziation: * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings

of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, and to be made a part of the record . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

In the Supreme Court of the United States

October Term, 1964

No. 753

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

KIT MANUFACTURING COMPANY, INC.,
Respondent.

No. 18,940

[August 5, 1964]

On Petition for Enforcement of an Order of the National Labor Relations Board

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Before: CHAMBERS, MERRILL and DUNIWAY, Circuit Judges

MERRILL, Circuit Judge:

This case is before the court upon petition of the National Labor Relations Board, pursuant to §10(e) of the National Labor Relations Act as amended, 29 U.S.C. §160(e), for enforcement of its order issued against respondent company on June 7, 1963, The Board's decision and order are reported at 142 NLRB No. 107.

The charged unfair labor practices occurred at the respondent company's plant in Caldwell, Idaho, where the company manufactures trailers and mobile homes.

The Board found three violations. First, that the company had violated §8(a) (5) and (1) of the Act, 29 U.S.C. §158(a) (5), (1), by refusing to bargain collectively with the Union; second that the company had violated §8(a) (1) of the Act by assisting and encouraging an employee in the circulation of a petition to decertify the Union; third that the company had violated §8(a) (3) and (1) of the Act, 29 U.S.C. §158(a) (3), (1), by its refusal to reinstate an employee who had participated in a strike against the company's unfair labor practices.

As to the first violation the Board adopted the findings and conclusions of the hearing examiner, based upon a lengthy recital of acts and conduct.[1] The hearing

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[1]We see no need to set these forth in detail. They included sending to the employees (but not to the Union) on June 15, 1962, a proposed incentive plan; unilaterally instituting a 10-

examiner concluded that "the company has, on and after June 15, 1962, failed and refused to bargain collectively with the Union, and thereby interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in §7 of the Act, in violation of §8(a) (5) and (1) thereof."

The company asserts that throughout it acted in good faith. Further, it seeks to justify its conduct in several ways.[2]

These contentions were made before the hearing examiner, and are dealt with in his intermediate report. For the reason and upon the findings there set forth the conclusions of the hearing examiner that the company had not acted in good faith in its dealings with the Union cannot be overruled.

We conclude that as to this violation the order of the Board is entitled to enforcement.

As to the second violation, it appears that one Blair, an employee of the company, approached the plant

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cent-an-hour wage increase on the day which the employees struck the company; a refusal to negotiate until after the Board had handed down its decision on another charge of unfair labor practice against the company then pending before the Board; the company's request, as a condition to negotiation, that the Union withdraw its charges against the company.

[2]It contends that it had in good faith bargained to an impasse; that it had in good faith doubts that the Union could claim to represent the employees; that it could with propriety postpone negotiations until disposition of the charge of unfair labor practice, then pending before the Board.

manager for a pay raise on behalf of the employees and was told that no raise could be granted because it would bring forth unfair labor practice charges from the Union. Shortly thereafter Blair discussed the matter with other employees and later told the plant manager that he wished to circulate a petition to decertify the Union and asked for company permission. The plant manager refused permission. Blair then said he was going to do so anyway. The plant manager then stated that "there is nothing I can do to stop you from doing this; you're 21 years old and you know your own mind"; but that Blair had no permission to do so. Blair did circulate the petition during working hours. However, being advised that it was defective in form it was never formally presented.

The hearing examiner concluded that by failing to warn Blair that he could not solicit signatures during working hours without violating company rules, and by failing to discipline or reprimand him, the company had "aided and assisted Blair in the circulation of his petition," in violation of §8(a) (1). The Board agreed with this conclusion.

In other words, the hearing examiner and the Board have both found that the company, by this failure to come actively to the defense of the Union, has interfered with, restrained or coerced its employees in their rights to self-organization — the conduct proscribed by §8(a) (1).

We cannot agree. There is no showing whatsoever

of active company support, encouragement or cooperation. There is only a showing of a failure to forcibly prevent, obstruct or punish action taken by an employee entirely on his own initiative with knowledge that company permission was withheld and taken in accordance with the wishes not of the company but of himself and certain of his fellow employees. This, without more on the company's behalf, in our judgment cannot constitute company interference, restraint or coercion of its employees.

As to this asserted violation, the order will not be enforced.

The third violation has to do with one Tveidt, a company employee. The Board found that the company had discriminatorily discharged him in violation of §8(a) (3) and (1) of the Act.

Tveidt had gone on strike with the other striking employees, but had then voluntarily returned to work. Subsequently, without giving the company notice, he had walked off the job and rejoined the picket line. When the strike terminated the other striking employees were reinstated. Tveidt was not.

The plant manager testified that Tveidt was discharged for violation of a company rule: failing to report for work after the lunch period without punching out or telling his foreman that he was leaving. If he left to engage in concerted action, however, the discharge would have been discriminatory, notwithstand-

ing such violation. *Giustina Brothers Lumber Company,* 116 NLRB 700, 735, enforced sub nom. *NLRB v. Giustina Bros. Lbr. Co.* (9 Cir. 1958) 253 F.2d 371, holds that a group of employees who accepted re-employment for a few days during a strike and then rejoined the strike were entitled to reinstatement, the same as the other strikers. In *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9, the Supreme Court held that since the conduct of a group of employees in walking off their jobs in protest of cold working conditions was concerted activity protected under §7 of the Act, discharging the employees for such conduct violated §8(a) (1) even though the walkout violated a plant rule forbidding employees to leave their work without permission of the foreman. In *Home Beneficial Life Insurance Co. v. NLRB* (4 Cir. 1947) 159 F.2d 280, it was held that an employer could not discharge its insurance agent employees for failing to report one morning to their respective offices before beginning their outside work, where such failure to report—even though a violation of a company rule—was the beginning of a strike by those employees.

In the instant case the hearing examiner, in his interim report, noted Tveidt's testimony that on the morning of the day he returned to work some of the employees laughed at him and made remarks the substance of which he did not overhear, and that during lunch he met with four other returning strikers. "Seemingly," continued the examiner, "Tveidt mentioned what had happened that morning and he, Egan

and Post decided not to return to work at the end of the luncheon period." The examiner concluded:

"Here the undisputed evidence shows that Tveidt left his employment for purely personal reasons, not because of any fair labor practices on the part of the company or in furtherance of the objectives of the strike. Accordingly I find that irrespective of whether he voluntarily quit his employment or was terminated for leaving his job he was not thereafter entitled to reinstatement as a striking employee *(The W. T. Raleigh Company,* 90 *NLRB,* 1924-1927)."

The Board differed. In its order it stated:

"The mere fact that he voluntarily went back to work for a few hours on July 23 does not imply that his dissatisfaction over the unfair labor practices ceased, especially when, only shortly thereafter, he rejoined the strike. Unlike the employee in *Rawleigh,* Tveidt knew the Respondent's unfair labor practices were continuing, and, irrespective of the immediate cause of his failure to return to work in the afternoon after lunch on July 23, his actions thereafter show that he left the job in order to associate himself actively with the strikers in protesting the unfair labor practices. For, by joining the picket line, Tveidt clearly evidenced his continuing interest in his employment and working conditions and his intent to resume his status as an unfair labor practice striker. Furthermore, the Respondent knew Tveidt

was still on strike. Reber, having seen Tveidt on the picket line, should have known he had not quit and continued to have an interest in his employment, particularly since Reber was unaware of any other reason why Tveidt might have left the plant."

The Board appears to have inferred from the record that Tveidt's walkout was so closely related to the strike that it could not be cause for his discharge where, as here, neither the walkout nor any other conduct of Tveidt as a striker or picketer amounted to the serious strike misconduct which forfeits the striker's right to reinstatement.[4] We cannot say that this inference was unreasonable or unsupported by substantial evidence.

Moreover, the result would be the same even if, as found by the examiner, Tveidt's walkout was not initially related to the strike but was motivated solely by other, personal reasons, with the result that, being not part of protected activity but merely a violation of a company rule, it would have been ground for Tveidt's immediate discharge. See *NLRB v. Industrial Cotton Mills* (4 Cir. 1953) 208 F.2d 87; *Home Beneficial Life Insurance Co. v. NLRB, supra;* cf. *Hamilton v. NLRB* (6 Cir. 1947) 160 F.2d 465, 469. Here the plant manager testified that when one of

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[4]See *NLRB v. Industrial Cotton Mills* (4 Cir. 1953) 208 F. 2d 87. Compare *NLRB v. Fansteel Metallurgical Corp.* (1939) 306 U.S. 240; and *NLRB v. Kelco Corp.* (4 Cir. 1949) 178 F. 2d 578; with *NLRB v. Buitoni Foods Corp.* (3 Cir. 1962) 298 F.2d 169, 174-175; and *NLRB v. J. Mitchko, Inc.* (3 Cir. 1960) 284 F.2d 573, 576-577.

those who had walked off with Tveidt returned the next morning he was put back to work, and that Tveidt's job had been held open "for several days" before Tveidt's discharge was made final. Therefore it would appear clear that Tveidt was discharged not simply because of the walkoff but also because of his failure to return within "several days." Since he did rejoin the strike the day following his walkout, or shortly thereafter, the discharge was thus in essential part on account of his participation in the strike. It therefore was a violation of §8(a) (1) and (3).

The Board ordered the company to reinstate Tveidt and to reimburse him for any loss of pay he may have suffered by reason of the company's failure to reinstate him. The order in this respect is entitled to enforcement.

Decree will be entered enforcing the order as prayed as to the first and third violations specified and denying enforcement as to the second violation specified.

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FILED
DEC 11 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1964

No. 753

ADDENDA B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

October Term, 1964

No._____

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
KIT MANUFACTURING COMPANY, INC.
Respondent.
No. 18,940

DECREE

Before: CHAMBERS, MERRILL and DUNIWAY, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board for enforcement of its order issued against the Respondent on June 7, 1963. The Court heard argument of respective counsel on

March 2, 1964, and has considered the briefs and transcript of record filed on this case. On August 5, 1964, the Court, being fully advised in the premises, handed down its opinion granting in part and denying in part the Board's said order. In conformity therewith, it is hereby,

Ordered, adjudged and decreed by the United States Court of Appeals for the Ninth Circuit that the Respondent, Kit Manufacturing Company, Inc., Caldwell, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other conditions of employment with Sheet Metal Workers International Association, Local Union 213, AFL-CIO, as the exclusive representative of all its employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its Caldwell, Idaho, plant, excluding office clerical employees, professional employees, servicemen, and all supervisors as defined in the Act.

(b) Discouraging membership in and activity on behalf of Sheet Metal Workers International Association, Local Union 213, AFL-CIO, or any other labor organization of its employees, by refusing to reinstate Charles Tveidt or otherwise discriminating against him in regard to his hire or tenure of employment or any term or condition of employment, except as permitted by the proviso to Section 8(a)(3) of the National

Labor Relations Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959 (herein after called the Act.)

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found effectuate the policies of the Act:

(a) Upon request, bargain collectively concerning rates of pay, wages, hours of employment, and other conditions of employment with Sheet Metal Workers International Association, Local Union 213, AFL-CIO, as the exclusive representative of all employees in the above-described unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Charles Tveidt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging, if necessary, any employee hired since July 23, 1962, to replace him, or if employment is not available, place him on a preferential hiring list, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, together with interest at the rate of 6 percent per annum, in the manner set forth in the section of the Board's Decision and Order entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyse the amount of back pay and interest due under the terms of this Decree.

(d) Post at its Caldwell, Idaho, plant, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region (Seattle, Washington) shall, after being signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.
Endorsed, Decree Filed and Entered

FRANK H. SCHMID
Clerk

A TRUE COPY,

ATTEST:

Frank H. Schmid
Clerk)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A decree of the United States Court of Appeals enforcing, as modified, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will, upon request, bargain collectively with SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 213, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by the Employer at its Caldwell, Idaho, plant, excluding office clerical employees, professional employees, servicemen, and all supervisors as defined in the Act.

We will not discourage membership in and activity on behalf of SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 213, AFL-CIO, or any other labor organization of our employees, by refusing to reinstate Charles Tvedt or otherwise discriminating against him in regard to his hire or tenure of employment or any term or

condition of employment, except as permitted by the provisor to Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We will offer Charles Tveidt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging, if necessary, any employee hired since July 23, 1962, to replace him, or if employment is not available, place him on a preferential hiring list, and we will make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, together with interest at the rate of 6 percent per annum.

KIT MANUFACTURING COMPANY, INC.
(Employer)

Dated——————By——————————
(Representative) (Title)

NOTE: We will notify Charles Tveidt if present-

ly serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, 500 Union Street, Seattle 4 Washington (Tel. No. Mutual 2-3300, Ext. 553), if they have any questions concerning this notice or compliance with its provisions.

FILE COPY

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FILED
JAN 11 1965
JOHN F. DAVIS, CLERK

No. 753

In the Supreme Court of the United States

OCTOBER TERM, 1964

KIT MANUFACTURING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
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ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
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Attorney,
National Labor Relations Board,
Washington, D.C., 20570.

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CITATIONS

Cases:

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Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*):	
Section 8(a)(1)	2, 3, 6, 7, 8
Section 8(a)(3)	7, 8
Section 8(a)(5)	2, 3, 6, 7

759-916—65——1

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 11–17) is reported at 335 F. 2d 166. The Board's decision and order (R. 80–85)[1] are reported at 142 NLRB 957.

JURISDICTION

The decision of the court of appeals was rendered on August 5, 1964; a petition for rehearing was denied on September 15, 1964; and a decree was entered on September 18, 1964 (R. 73, 79, 80). The petition

[1] "R." refers to Volume I, and "Tr." refers to Volume II, of the Transcript of Record filed with this court.

for a writ of certiorari was filed on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the company violated Sections 8(a) (5) and (1) of the National Labor Relations Act by refusing to bargain in good faith with the Union, and Sections 8(a) (3) and (1) of the Act by refusing reinstatement to an employee who struck in protest against the unfair labor practices.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix A to the petition.

STATEMENT

1. *Background.*—On March 31, 1961, the Board certified Local Union 213, Street Metal Workers International Association, AFL–CIO, as the bargaining representative of petitioner's production and maintenance employees. Petitioner and the Union reached an impasse in contract negotiations on September 27, 1961, over the Union's demands for union security provisions and wage increases.[2] On March 13, 1962, the Union requested further negotiations noting improved conditions in the industry and its progress in organizing the industry. The Company

[2] The Union filed charges in December 1961 alleging that petitioner, by the above conduct, had refused to bargain in violation of Sections 8(a) (5) and (1) of the Act; these charges were dismissed by the Board's Regional Director on January 9, 1962. Board Case No. 19–CA–2341.

declined to bargain further on March 23, 1962, on the grounds that the parties had previously reached an impasse in negotiations, that the certification year was about to expire, and that the Union no longer represented a majority of the employees in the bargaining unit. In May 1962, pursuant to charges filed by the Union, the Board's General Counsel issued a complaint, alleging that, by its refusal to bargain in March, the Company had violated Sections 8(a) (5) and (1) of the Act (R. 23, 24; Board Case No. 19–CA-2406). On July 30, 1962, the Trial Examiner issued his report, sustaining the allegations of the complaint. The Trial Examiner's finding of a refusal to bargain on and after March 23 was affirmed by the Board, and the Board's order was enforced by the court below on August 12, 1963. 138 NLRB 1290, enforced, 319 F. 2d 857 (C.A. 9).

While the latter case was pending before the Board, petitioner engaged in the unfair labor practices which form the basis for the present case.

2. *The refusal to bargain in June 1962 and the ensuing strike.*—On June 15, 1962, petitioner, bypassing the Union, mailed the employees a proposed wage incentive plan. The employees showed no interest in the plan and petitioner dropped the matter (R. 25; Tr. 104).

On Thursday evening, June 28, the employees voted to strike on Monday, July 2, if petitioner persisted in its refusal to negotiate with the Union (R. 26; Tr. 16). That same evening, petitioner posted a notice announcing a 10-cent an hour wage increase, to become effective Monday morning (R. 26; Tr. 120–121, 241).

The next morning, Plant Manager Miles Reber warned the employees that strikers would be permanently replaced (R. 27; Tr. 146, 150). Reber also called the Union's business agent and asserted that the Company had no obligation to meet with the Union until it "received the results of the hearing" in the pending unfair labor practice case (R. 26; Tr. 14–15).

On July 2, 80 of petitioner's 108 employees struck in protest against petitioner's refusal to bargain with the Union. Petitioner rejected a Union request for a meeting during the first week of the strike, but met with the Union on July 18 pursuant to arrangements made by the Federal Mediation and Conciliation Service. Petitioner announced that it would "conciliate and not negotiate," and offered to reinstate 20 strikers and place the others on a preferential hiring list. The Union rejected this offer and the meeting ended without arrangements for a future meeting (R. 27; Tr. 26–27, 60, 193).

On August 3, after the Trial Examiner issued his report finding a refusal to bargain in the earlier case (*supra*, p. 3), the Union requested petitioner to reinstate the strikers on August 6 and to meet with it on that day. On August 6, petitioner told the strikers who appeared at the plant to come back on August 13. It also offered to recognize the Union and to reinstate 25 strikers, with preferential hiring for the other strikers, if the Union would "absolve" it of unfair labor practices. The Union rejected petitioner's offer and, on August 8, filed unfair labor practice charges against the Company. The next day, petitioner ad-

vised the Union that it would reinstate all the strikers on August 13, and offered to bargain with the Union upon five days' notice (R. 28–29).

The parties thereafter met on August 21, September 18, and October 1, 1962. At the August 21 meeting, Plant Manager Reber refused to discuss the Union's proposal for a maintenance-of-membership clause, allegedly because he did not know the meaning of such a clause and could not bargain on any form of union security without the permission of petitioner's top officials (R. 29; Tr. 195–196). He also refused to discuss wages on the ground that the unilateral wage increase granted on July 2 (*supra*, p. 3) foreclosed any further increase (R. 29; Tr. 44–45). He promised to send the Union wage data, which it had requested earlier that month (R. 29; Tr. 196–197).

Before the next meeting on September 18, petitioner offered, as its contract proposal, the contract rejected by the Union a year before. At the September 18 meeting, the Union submitted a proposed contract, but it was only briefly discussed because petitioner said it wanted to study the proposal at its "leisure" and come back with a counterproposal (R. 29–30; Tr. 200).

At the October 1 meeting, petitioner insisted that its contract proposal of September 1961 be submitted to the employees even though it was unacceptable to the Union representatives (R. 30; Tr. 204). The Union submitted the proposal to the employees, who unanimously rejected it (R. 30).

3. *The refusal to reinstate striker Charles Tveidt.*— Charles Tveidt was one of the employees who went

out on strike on July 2, in protest against the Company's unfair labor practices (R. 31; Tr. 170). Tveidt and four other strikers applied for reinstatement on the morning of July 23 and were put back to work by Plant Manager Reber (R. 34; Tr. 170–171). During the morning, some employees laughed at Tveidt and made remarks which he could not make out. Tveidt had lunch with the other returning strikers and mentioned what had happened to him that morning. Tveidt and two others—Egan and Post—decided not to return to work and left the plant without punching out their timecards or informing any supervisor of their decision. Tveidt rejoined the strikers and was seen by Reber back on the picket line either the next day or shortly thereafter (R. 35; Tr. 250). Although Reber had prepared a report on the afternoon of July 23, showing that Tveidt, Egan, and Post had been terminated for leaving the plant during working hours without permission, he rehired Egan when Egan reported for work the next morning (R. 35; Tr. 248). According to Reber, he would have reemployed Tveidt if he had reported that morning (R. 35; Tr. 248–249). Tveidt applied for reinstatement on August 13, as he and the others had been told to do on August 6 (*supra*, p. 4), but Reber refused his application on the ground that Tveidt had "walked back out" (R. 35; Tr. 174).

4. *The Board and court decisions.*—The Board found (R. 49), in agreement with the Trial Examiner, that petitioner violated Sections 8(a) (5) and (1) of the Act by refusing on and after June 15 to bargain in good faith with the Union. A Board majority also found (R. 50–51), contrary to the Trial Examiner (R. 35),

that petitioner violated Sections 8(a) (3) and (1) of the Act by refusing to reinstate Tveidt.[3] The Board ordered (R. 51–52) petitioner to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' rights under the Act, to bargain with the Union, to reinstate Tveidt with back pay, and to post an appropriate notice.

The court of appeals affirmed the Board's findings and enforced its order in those respects (Appendix, *infra*, pp. 10–17).

ARGUMENT

1. Contrary to petitioner (Pet. 6–8), the court below did not find that petitioner violated Sections 8(a) (5) and (1) of the Act by refusing to make concessions on the Union's union-security demands. Rather, it affirmed the Board's finding that petitioner's entire course of conduct on and after June 15, 1962, manifested a refusal to bargain in good faith with the Union. An evidentiary ruling of this kind plainly does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, it is clear that there is ample support for the Board's finding, in view of petitioner's action in sending the employees (but not the Union) a proposed incentive plan, in unilaterally instituting a 10-cent an hour wage increase on the day the employees struck petitioner, in refusing to meet

[3] The Board further found that petitioner had violated the Act by encouraging an employee to circulate a petition to decertify the Union (R. 49, 31). The court below set aside this finding, and it is not at issue now.

with the Union until the Board ruled on the Union's charges against petitioner, and in requesting as a condition of negotiations that the Union withdraw its charges against petitioner (Appendix, *infra*, p. 12, n. 1).

2. Nor does petitioner's claim (Pet. 8–10) that Charles Tveidt was discharged for leaving work without permission on July 23, 1962, present any issue warranting review by this Court. The court below found, in agreement with the Board, that Tveidt left his job to rejoin the strike against petitioner's unlawful refusal to bargain and that thus, as an unfair labor practice striker, he was entitled to reinstatement when he reapplied for work along with the other strikers on August 6 (Appendix, *infra*, pp. 16–17). The court's ruling in this respect is clearly correct. *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 398, 404 (C.A. 2), certiorari denied, 347 U.S. 953; *Giustina Bros. Lumber Co.*, 116 NLRB 700, 735, enforced *sub nom. National Labor Relations Board* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371 (C.A. 9); cf. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 14–15.

Moreover, even assuming that Tveidt left his job without permission on July 23 for personal reasons, he was terminated a few days later, not for violating a plant rule against leaving work without permission, but because petitioner knew he had rejoined the strike. Since Tveidt's discharge "was thus in essential part on account of his participation in the strike" (Appendix, *infra*, p. 17), it violated Sections 8(a) (1) and (3) of the Act, even though other elements

entered into the Company's decision. *National Labor Relations Board* v. *Great Eastern Color Lithographic Corp.*, 309 F. 2d 352, 355 (C.A. 2), certiorari denied, 373 U.S. 950; *National Labor Relations Board* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 348–349 (C.A. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
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DOMINICK L. MANOLI,
Associate General Counsel,
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MELVIN POLLACK,
Attorney,
National Labor Relations Board.

JANUARY 1965.

APPENDIX

United States Court of Appeals
For the Ninth Circuit

No. 18,940

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

KIT MANUFACTURING COMPANY, INC., RESPONDENT

[August 5, 1964]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before CHAMBERS, MERRILL and DUNIWAY, *Circuit Judges*

MERRILL, *Circuit Judge:*

This case is before the court upon petition of the National Labor Relations Board, pursuant to § 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e), for enforcement of its order issued against respondent company on June 7, 1963. The Board's decision and order are reported at 142 NLRB No. 107.

The charged unfair labor practices occurred at the respondent company's plant in Caldwell, Idaho, where the company manufactures trailers and mobile homes.

The Board found three violations. First, that the company had violated § 8(a) (5) and (1) of the Act, 29 U.S.C. § 158(a) (5), (1), by refusing to bargain collectively with the Union; second that the company had violated § 8(a)(1) of the Act by assisting and encouraging an employee in the circulation of a petition to decertify the Union; third that the company had violated § 8(a) (3) and (1) of the Act, 29 U.S.C. § 158(a) (3), (1), by its refusal to reinstate an employee who had participated in a strike against the company's unfair labor practices.

As to the first violation the Board adopted the findings and conclusions of the hearing examiner, based upon a lengthy recital of acts and conduct.[1] The hearing examiner concluded that "the company has, on and after June 15, 1962, failed and refused to bargain collectively with the Union, and thereby interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in § 7 of the Act, in violation of § 8(a)(5) and (1) thereof."

The company asserts that throughout it acted in good faith. Further, it seeks to justify its conduct in several ways.[2]

---

[1] We see no need to set these forth in detail. They included sending to the employees (but not to the Union) on June 15, 1962, a proposed incentive plan; unilaterally instituting a 10-cent-an-hour wage increase on the day on which the employees struck the company; a refusal to negotiate until after the Board had handed down its decision on another charge of unfair labor practice against the company then pending before the Board; the company's request, as a condition to negotiation, that the Union withdraw its charges against the company.

[2] It contends that it had in good faith bargained to an impasse; that it had in good faith doubts that the Union could claim to represent the employees; that it could with propriety postpone negotiations until disposition of the charge of unfair labor practice, then pending before the Board.

These contentions were made before the hearing examiner, and are dealt with in his intermediate report. For the reason and upon the findings there set forth the conclusions of the hearing examiner that the company had not acted in good faith in its dealings with the Union cannot be overruled.

We conclude that as to this violation the order of the Board is entitled to enforcement.

As to the second violation, it appears that one Blair, an employee of the company, approached the plant manager for a pay raise on behalf of the employees and was told that no raise could be granted because it would bring forth unfair labor practice charges from the Union. Shortly thereafter Blair discussed the matter with other employees and later told the plant manager that he wished to circulate a petition to decertify the Union and asked for company permission. The plant manager refused permission. Blair then said he was going to do so anyway. The plant manager then stated that "there is nothing I can do to stop you from doing this; you're 21 years old and you know your own mind"; but that Blair had no permission to do so. Blair did circulate the petition during working hours. However, being advised that it was defective in form it was never formally presented.

The hearing examiner concluded that by failing to warn Blair that he could not solicit signatures during working hours without violating company rules, and by failing to discipline or reprimand him, the company had "aided and assisted Blair in the circulation of his petition," in violation of § 8(a)(1). The Board agreed with this conclusion.

In other words, the hearing examiner and the Board have both found that the company, by this failure to come actively to the defense of the Union, has inter-

fered with, restrained or coerced its employees in their rights to self-organization—the conduct proscribed by § 8(a)(1).

We cannot agree. There is no showing whatsoever of active company support, encouragement or cooperation. There is only a showing of a failure to forcibly prevent, obstruct or punish action taken by an employee entirely on his own initiative with knowledge that company permission was withheld and taken in accordance with the wishes not of the company but of himself and certain of his fellow employees. This, without more on the company's behalf, in our judgment cannot constitute company interference, restraint or coercion of its employees.

As to this asserted violation, the order will not be enforced.

The third violation has to do with one Tveidt, a company employee. The Board found that the company had discriminatorily discharged him in violation of § 8(a)(3) and (1) of the Act.

Tveidt had gone on strike with the other striking employees, but had then voluntarily returned to work. Subsequently, without giving the company notice, he had walked off the job and rejoined the picket line. When the strike terminated the other striking employees were reinstated. Tveidt was not.

The plant manager testified that Tveidt was discharged for violation of a company rule: failing to report for work after the lunch period without punching out or telling his foreman that he was leaving. If he left to engage in concerted action, however, the discharge would have been discriminatory, notwithstanding such violation. *Giustina Brothers Lumber Company,* 116 NLRB 700, 735, enforced sub nom. *NLRB* v. *Giustina Bros. Lbr. Co.* (9 Cir. 1958) 253 F. 2d 371, holds that a group of employees who ac-

cepted re-employment for a few days during a strike and then rejoined the strike were entitled to reinstatement, the same as the other strikers. In *NLRB* v. *Washington Aluminum Co.* (1962) 370 U.S. 9, the Supreme Court held that since the conduct of a group of employees in walking off their jobs in protest of cold working conditions was concerted activity protected under § 7 of the Act, discharging the employees for such conduct violated § 8(a)(1) even though the walkout violated a plant rule forbidding employees to leave their work without permission of the foreman. In *Home Beneficial Life Insurance Co.* v. *NLRB* (4 Cir. 1947) 159 F. 2d 280, it was held that an employer could not discharge its insurance agent employees for failing to report one morning to their respective offices before beginning their outside work, where such failure to report—even though a violation of a company rule—was the beginning of a strike by those employees.

In the instant case the hearing examiner, in his interim report, noted Tveidt's testimony that on the morning of the day he returned to work some of the employees laughed at him and made remarks the substance of which he did not overhear, and that during lunch he met with four other returning strikers. "Seemingly," continued the examiner, "Tveidt mentioned what had happened that morning and he, Egan and Post decided not to return to work at the end of the luncheon period." The examiner concluded:

> "Here the undisputed evidence shows that Tveidt left his employment for purely personal reasons, not because of any unfair labor practices on the part of the company or in furtherance of the objectives of the strike. Accordingly I find that irrespective of whether he voluntarily quit his employment or was termi-

> nated for leaving his job he was not thereafter entitled to reinstatement as a striking employee (*The W. T. Raleigh Company,* 90 NLRB, 1924-1927)."

The Board differed. In its order it stated:

> "The mere fact that he voluntarily went back to work for a few hours on July 23 does not imply that his dissatisfaction over the unfair labor practices ceased, especially when, only shortly thereafter, he rejoined the strike. Unlike the employee in *Rawleigh,* Tveidt knew the Respondent's unfair labor practices were continuing, and, irrespective of the immediate cause of his failure to return to work in the afternoon after lunch on July 23, his actions thereafter show that he left the job in order to associate himself actively with the strikers in protesting the unfair labor practices. For, by joining the picket line, Tveidt clearly evidenced his continuing interest in his employment and working conditions and his intent to resume his status as an unfair labor practice striker. Furthermore, the Respondent knew Tveidt was still on strike. Reber, having seen Tveidt on the picket line, should have known he had not quit and continued to have an interest in his employment, particularly since Reber was unaware of any other reason why Tveidt might have left the plant."

The Board appears to have inferred from the record that Tveidt's walkout was so closely related to the strike that it could not be cause for his discharge where, as here, neither the walkout nor any other conduct of Tveidt as a striker or picketer amounted to the serious strike misconduct which forfeits the striker's right to reinstatement.[3] We cannot

[3] See *NLRB* v. *Industrial Cotton Mills* (4 Cir. 1953) 208 F. 2d 87. Compare *NLRB* v. *Fansteel Metallurgical Corp.* (1939) 306 U.S. 240; and *NLRB* v. *Kelco Corp.* (4 Cir. 1949) 178 F.

say that this inference was unreasonable or unsupported by substantial evidence.

Moreover, the result would be the same even if, as found by the examiner, Tveidt's walkout was not initially related to the strike but was motivated solely by other, personal reasons, with the result that, being not part of protected activity but merely a violation of a company rule, it would have been ground for Tveidt's immediate discharge. See *NLRB* v. *Industrial Cotton Mills* (4 Cir. 1953) 208 F. 2d 87; *Home Beneficial Life Insurance Co.* v. *NLRB, supra*; *cf. Hamilton* v. *N.L.R.B.* (6 Cir. 1947) 160 F. 2d 465, 469. Here the plant manager testified that when one of those who had walked off with Tveidt returned the next morning he was put back to work, and that Tveidt's job had been held open "for several days" before Tveidt's discharge was made final. Therefore it would appear clear that Tveidt was discharged not simply because of the walkoff but also because of his failure to return within "several days." Since he did rejoin the strike the day following his walkout, or shortly thereafter, the discharge was thus in essential part on account of his participation in the strike. It therefore was a violation of § 8(a)(1) and (3).

The Board ordered the company to reinstate Tveidt and to reimburse him for any loss of pay he may have suffered by reason of the company's failure to reinstate him. The order in this respect is entitled to enforcement.

Decree will be entered enforcing the order as prayed as to the first and third violations specified and denying enforcement as to the second violation specified.

2d 578; with *NLRB* v. *Buitoni Foods Corp.* (3 Cir. 1962) 298 F. 2d 169, 174–175; and *NLRB* v. *J. Mitchko, Inc.* (3 Cir. 1960) 284 F. 2d 573, 576–577.

U. S. GOVERNMENT PRINTING OFFICE: 1965